



An
Bord
Pleanála

Inspector's Report RL09.RL3812

Question

Whether the erection of an unroofed fenced area for the exercising or training of horses or ponies together with a drainage bed or soft surface material to provide an all weather surface is or is not development or is or is not exempted development.

Location

Palmerstown House Estate,
Johnstown, Co. Kildare.

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

ED00592

Applicant for Declaration

Luke Comer

Planning Authority Decision

Is development and is not exempted development

Referral

Referred by

Luke Comer

Owner/ Occupier

Luke Comer

Observer(s)

Killeen Golf Club

Date of Site Inspection

16th January 2018

Inspector

Erika Casey

1.0 Site Location and Description

- 1.1. The subject site is located within the Palmerstown Demesne to the west of Johnstown. The estate has an overall area of c. 312 hectares and includes Palmerstown House, farmyard, stables, walled garden and a golf course with associated club house. The subject site is located to the north of the estate adjacent to the Killeen Golf Course. A small stream runs along the boundary with the golf course.
- 1.2. The applicant proposes to construct an exercise track/gallops run for racing horses. It was observed on site that significant works in relation to the track have already been undertaken. Grass cover has been cleared and extensive filling has occurred on the subject site. The site of the track has been raised above the surrounding ground level. A rough track has been established covered in loose shale and stone. Drainage works have been undertaken with drainage pipes installed.
- 1.3. It is detailed in the referral drawings that the route of the proposed exercise track/gallops run extends in an east west direction for a distance of c.0.83 km and has a width of c. 12 metres. It was observed on site that the width of the track as constructed is wider than this and at points would extend to a width of c. 20 metres. It is stated in the referral documentation that along the route, a shallow trench will be excavated and back filled with stones and then topped with a mixture of sand and rubber or wood. To address potential flood impacts, it is proposed that perforated land drains are to be installed on either side of the track connected to lateral drains at 5 metre centres to channel water run off.
- 1.4. Correspondence from Barrett Mahony Chartered Engineers accompanies the referral stating that soil and bedrock obtained from a site on Shelbourne Road will be used for fill purposes. It notes that soil samples undertaken identify that the material is suitable for general fill purposes. A Flood Risk Assessment and Screening Report for Appropriate Assessment also accompany the referral.

2.0 The Question

- 2.1. The question posed is whether the erection of an unroofed fenced area for the exercising or training of horses together with a drainage bed or soft surface material

to provide an all weather surface at Palmerstown House Estate is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

3.1.1 On the 4th of September 2017, Kildare County Council declared that the erection of an unroofed fenced area for the exercising or training of horses or ponies, together within a drainage bed or soft surface material to provide an all-weather surface is development and is not exempted development under Class 10 of Part 3 of Schedule 2 to the Planning and Development Regulations, 2001 (as amended) for the reason that the restrictions on exemptions outlined in Article 9 (viii) of the Regulations, apply in this instance.

3.2. Planning Authority Reports

3.2.1. Planning Reports (07.02.2017 and 31.08.2017)

- In relation to the 4 conditions listed under Class 10 Schedule 2 of Part 3 of the Regulations, the exercise track is for private use and no public events will be staged; the track is not within 10 metres of any public road and not directly accessed off any public road; and the track will be enclosed by a fence of 1.35 metres in height.
- In relation to the restrictions under Article 9 of the Planning and Development Regulations 2001, the Planning Authority notes that none of these restrictions apply with the exception of part (viii) relating to the *extension, alteration, repair or renewal of an unauthorised structure or a structure of which is an unauthorised use*. Notes that this restriction is applicable due to enforcement proceedings that were initiated by Kildare Co. Co. under case UD6650.
- The Planning Authority noted a number of deficiencies with the referral in that the details of the extent of the track to be constructed are inaccurate and the layout plan did not indicate ESB lines and existing hedgerows. Errors in the Screening Report were also noted.

- Notes that no detail regarding the quantum of fill which has been imported to the site to date has been provided and that from the site inspection, it was clear that the fill imported to date was not solely composed of stones, sand and rubber or wood and that pieces of protruding metal were apparent.
- Further information was requested by the Planning Authority with respect to revised drawings/screening report and details of the quantum and source of fill that has been imported to the site. No response submitted by the applicant.
- On the 6th of March 2017 correspondence was received by Kildare County Council from the EPA under Article 27 of the European Communities (Waste Directive) Regulations 2011, SI. No. 126 of 2011 (no. 264) regarding a by product by High Chapparral Property Company in relation to soil and stone at Palmerstown House Estate, Johnstown, Co. Kildare. The notification outlined that the material was arising from excavation work at a development site and a determination that the material was waste was issued by the EPA. A site visit by Council officials confirmed that filling of lands c. 200 metres *20 metres had taken place to a height in excess of 4 metres at its highest point.
- Having regard to the content of the documentation submitted with the application, correspondence from the EPA and the provisions of Section 3 (2) (b) (iii), the importation of material (builders waste) at this location to facilitate the development of exercising gallops is considered to be development.
- A review of the Planning Register indicates that no permission has been sought or granted for the deposit of waste at this location. In this regard, the restrictions on exemptions under Article 9 (1) of the Planning and Development Regulations, 2001 apply whereby the development is considered to consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure of which is an unauthorised use.

3.2.2. Other Technical Reports

- No other reports received.

4.0 Planning History

4.1 There have been a number of other planning applications within the Palmerstown Demesne. These are set out in the Planning Authority Planner's Report and are not pertinent to the subject referral. Relevant planning history is set out below.

Planning Authority Reference 15/1006

4.2 Permission sought by High Chaparral for the retention permission and permission to complete development comprising the erection of an unroofed fenced gallops area for the training of horses together with a drainage bed to provide an all weather surface.

4.3 The application was deemed invalid on the basis that the quantum of fill to be retained was not specified.

Planning Authority Reference ED619

4.4 Section 5 Referral made by the Killeen Golf Club as to whether a development comprising the erection of an unroofed fenced area for the exercising or training of horse or ponies together with a drainage bed or soft surface material to provide an all-weather surface at Palmerstown House, Johnstown, Co. Kildare is exempted development. Kildare County Council, on the 18th of September 2017, issued a decision which determined it is development and is not exempted development.

Enforcement

UD6650

4.5 Warning Letter issued the 11th of August 2015 to Barry Comer (Company Secretary, High Chaparral Property Company Limited) regarding unauthorised development comprising land filling to a height of 4 metres with soil and stone at Palmerstown Demesne, Johnstown, Co. Kildare.

4.6 Enforcement Notice issued on the 24th of August 2017 in relation to the same unauthorised development.

5.0 Policy Context

5.1. Development Plan

5.1.1 The current operative development Plan is the Kildare County Development Plan 2017-2023. Section 10.4.2 recognises the importance of the equine industry and Section 10.5.4 sets out policies. Palmerstown House is a protected structure - reference BD19-10.

5.2. Natural Heritage Designations

5.2.1 Natura 2000 sites in the vicinity of the site are the Balltnafagh Bog SAC and Ballynafagh Lake SAC which are located c. 10 km and c. 12 km respectively to the west of the site. The Mouds Bog SAC is in excess of 12 km to the south west of the site. The Wicklow Mountains SAC and Glenasmole Valley SAC are located c. 16 km to the east. The Red Bog SAC is located c. 8km to the south east. The Grand Canal PNHA is c. 130 metres west of the site.

6.0 The Referral

6.1. Referrer's Case

- The works fall into the definition of exempted development prescribed under Class 10 of Schedule 2, Part 3 of the Planning and Development Regulations, 2001 (as amended).
- Refers to the precedent referral decision in relation to a site at the former Kiltiernan Golf and County Club, Enniskerry Road, Kiltiernan – Reference RL06D.RL3363.

6.2. Planning Authority Response

- No further comments. Refers to two Planner's Reports associated with the application and the correspondence received from the Environmental Protection Agency.

6.3. Submissions

6.3.1 On the 14th November 2017, the Board sought a submission from Riverbury PLC on behalf of the Killeen Golf Club. A section 5 declaration had previously been issued to Killeen Golf Club on the 18th September 2017 – Reference ED/00619. Key points raised can be summarised as follows:

- Killeen Golf Club is located parallel to the proposed track. Concerns raised regarding potential noise impacts.
- Also concerned regarding the clearance of mature trees, the importation of a significant volume of fill material and the potential flood risks.
- Note that a number of complaints made to Kildare Co. Co. regarding alleged unauthorised development comprising the construction of a roadway approximately 400 metres long and 10 metres wide and the raising of ground levels and importation of fill. Refer to section 5 referral.
- Photographic evidence submitted indicating the extent of imported fill deposited on the site.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2 (1) of the Act provides the following definitions:

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...

“structure” means any building, structure, excavation, or other thing constructed or made on, in or under land, or any part of a structure so defined.”

Section 3(1) of the Act states the following in respect of ‘development’:

“In this Act, ‘development’ means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.”

Section 3 (2) (b) (iii) states “for the purposes of subsection (1) and without prejudice to the generality of that subsection – where the land becomes used for any of the following purposes – the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders waste, rubbish or debris, the use of the land shall be taken as having materially changed.”

Section 4 (1) sets out various forms and circumstances in which development is exempted development for the purposes of the Act.

Section 4 (2)(a) of the Act enables certain classes of development to be deemed exempted development by way of regulation.

7.2. **Planning and Development Regulations, 2001**

Article 6(1), subject to Article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with certain conditions and limitations.

Article 9 (1) of the regulations sets out various restrictions on works that would otherwise be exempted development under Article 6.

Class 10 of Schedule 2 of Part 3 of the Planning and Development Regulations 2001, as amended, provides that “*the erection of an unroofed fenced area for the exercising or training of horse or ponies together with a drainage bed or soft surface material to provide an all weather surface*”.

This exemption is subject to 4 conditions:

1. *No such structure shall be used for any purpose other than the exercising or training of horses or ponies.*
2. *No such area shall be used for the staging of public events.*
3. *No such structure shall be situated within 10 metres of any public road, and no entrance to such area shall be directly off any public road.*
4. *The height of any such structure shall not exceed 2 metres.*

8.0 Assessment

8.1 It should be noted that the purpose of this referral is not to determine the acceptability or otherwise of the exercise track/gallops run, but rather whether or not the matter in question constitutes development, and if so falls within the scope of exempted development.

8.1.3 In carrying out this assessment, the planning referrals data base was consulted. The following referrals of relevance were found.

RL2676

8.1.4 Whether the construction of unroofed fenced area for exercising horse/ponies with drainage bed and all weather surface and construction of 2 metre wall/fence is or is not exempted development or is or is not exempted development at Kilconlea, Abbeyfeale, Co. Limerick.

8.1.5 The Board in the August 2010 made a decision stating that the development was not exempted development.

RL3363

8.1.6 Whether the erection of an unroofed fenced area for the exercising or training of horse/ponies and a drainage bed or soft surface is or is not development or exempted development at the former Kiltiernan Golf and Country Club. The Board made a decision on the April 2016 stating that:

- (a) Construction of an unroofed fenced area constitute works.
- (b) The works constitute development pursuant to section 3 of the Planning and Development Act, 2000.
- (c) The development comes within the scope of Class 1 of Part 3 of the Schedule 2 of the Planning and Development Regulations 2001.

And concluded that the works were development and were exempted development.

8.1. **Is or is not development**

8.1.1. The subject development will require the excavation of land, backfilling and the construction of track topped with a mixture of sand and rubber or wood. I am

satisfied that due to the nature of the proposed works, that these would fall within the definition of 'works' under Section 2 of the Act and thus are considered to constitute 'development' for purposes of Section 3 of the Planning and Development Act.

8.2. Is or is not exempted development

- 8.2.1. Article 6(3) of the Planning and Development Regulations 2001, as amended makes provision for classes of development set out in Part 3 of the Regulations to be exempted development subject to any provisions of Article 9.
- 8.2.2. Class 10 of Schedule 2 of Part 3 of the Regulations provides that "*the erection of an unroofed fenced area for the exercising or training of horses or ponies together with a drainage bed or soft surface material to provide an all weather surface*" shall be exempted development subject to 4 conditions.
- 8.2.3. Having reviewed the information submitted by the applicant, I am satisfied that the development would not contravene any of the 4 conditions. It is understood that the track will be used for the purpose of exercising horses and will not be used for the staging of public events. The proposed track is not located within 10 metres nor accessed from a public road. It is stated in the documentation that the track will be bound by a fence that is 1.35 metres high and thus does not exceed the 2 metre height threshold.
- 8.2.4. I conclude, therefore, that the track as described in the referral documentation comes within the exempted development provisions of Class 10 of Schedule 2 of Part 3 of the Regulations.

8.3. Restrictions on exempted development

- 8.3.1. Article 9 of the Regulations sets out a number of restrictions on exempted development. Having regard to these restrictions I am satisfied that under Article 9 (1) (a):
- **(i):** The development does not contravene a condition of a previous permission as there is no planning history pertinent to the site.
 - **(ii), (iii):** The development does not relate to a development which would comprise alterations to an entrance to a public road. Nor would the

development endanger public safety by reason of a traffic hazard. The site has no access to a public road and the proposed use would not result in any intensification of traffic to the site.

- **(iv):** The development does not relate to the construction of a building and thus will have no impact on building lines.
- **(v):** The development does not relate to development comprising alterations to a building or works under a public road.
- **(vi):** Having regard to the extent of development and the provisions of the current Kildare County Development Plan, I am satisfied that the development would not interfere with the character of the landscape or a view or prospect of special amenity value or special interest, the preservation of which is an objective of the plan.
- **(vii), (viiA):** The development will not impact on places, caves, sites or features of archaeological, geological, historical, scientific or ecological interest. It will not consist of or comprise the excavation, alteration or demolition of any archaeological monument. The nearest recorded monument is c. 100 metres south of the site and the nearest protect structure is located a significant distance away.
- **(viiB):** In relation to Article 9(1)(a)(viiB) the Board must satisfy itself that the development does not require appropriate assessment. There are a number of Natura sites as detailed in section 5.2 above within 15 km radius of the site. There is no pathway connection between the development site and the Natura 2000 sites. It is not considered likely that any direct or indirect impacts will occur. Having regard to the separation distance between the Natura sites and the referral site, the qualifying interests for which these European sites have been designated and the form of development to which this referral relates, I am satisfied that no appropriate assessment issues arise. It is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site.
- **(ix):** The track does not comprise works to a building or structure to which this article would apply.

- **(x), (xi):** The track does not comprise fencing or enclosure of land habitually open to the public nor is there any evidence that it would obstruct a right of way.
- **(xii) (9) (1) (b):** The development is not within an ACA or an area subject of a Special Amenity Area Order.

8.3.2 **Article 9 (1) (a) (viii)** sets out the following restriction:

“Consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.”

8.3.3 As detailed in the Kildare County Council Planner’s Report and as observed on site extensive filling has occurred on site. Enforcement proceeding have been instigated by Kildare County Council in respect of this landfilling which is considered unauthorised.

8.3.4 A report by the EPA dated the 28th of February 2017 notes that this fill material was sourced from a construction site at the former Veterinary College site, Shelbourne Road, Dublin 4. It is contended by the applicants that this material has been tested and constitutes suitable fill material and is a by product.

8.3.5 The EPA report notes that such material can only be considered a by product and not as waste if it meets certain criteria. Condition (d) of Article 27 of the European Communities (Waste Directive) Regulations 2011 states that:

“further use is lawful in that the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.”

8.3.6 The report states that Kildare County Council were requested to comment on the notice and the following key points were noted:

- Trial holes were excavated in the horse gallop and waste items such as reinforcing bar and mixed construction and demolition waste were removed from the trial holes.
- Section 55 Notices were served by Kildare County Council on the landowners of the site in August 2015 in order to prevent or limit environmental pollution caused, or likely to be caused by the holding, recovery or disposal of waste.

- The proposed activity may lead to increased risk of flooding on adjacent lands and or the Morrel River.
- It is the opinion of Kildare County Council that the material is not suitable to classification as a by product.

8.3.7 The report concludes:

“I recommend that, in accordance with article 27(3)(a) of the regulations, the Agency makes a determination that the material in this case should be considered as waste.”

8.3.8 It is evident, therefore, that significant infilling of the site has already occurred. This infilling is to facilitate the construction of the track. It is has been stated by the applicant that this fill material has been tested and is classified as a suitable fill material. It is contended by the Planning Authority and the EPA however, that trial holes have indicated that this fill material also comprises of construction and demolition waste material and it is not considered that it constitutes a suitable fill material. The material is considered to constitute waste. It is noted that the applicant has provided no clarity as to the extent of the infill material imported to date nor any further clarity as to the nature and composition of that fill material.

8.3.9 **Section 3 (2) (b) (iii)** of the Act states *“for the purposes of subsection (1) and without prejudice to the generality of that subsection – where the land becomes used for any of the following purposes – the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, **builders waste, rubbish or debris**, the use of the land shall be taken as having materially changed.”*

8.3.10 In this regard, having regard to the report carried out by the EPA and trial holes undertaken by Kildare County Council, the material used for the infilling of the site and foundation of the track constitutes waste and debris and having regard to the provisions of Section 3 (2) (b) (iii), results in a material change of use of the subject lands. This change of use does not have the benefit of planning permission.

8.3.11 I consider, therefore, that the restriction on exemptions under Article 9 (1) (a) (viii) of the Planning and Development Regulations, 2001 (as amended) is applicable in this instance as the development of the exercise track at this location is considered to

“consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use”.

8.3.12 **Section 9 (a) (viiC)** sets out the following restriction:

“Consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.”

8.3.13 The Grand Canal is located approximately 130 m from the western end of the track and is designated as a proposed Natural Heritage Area. It is noted that the report of the EPA dated the 28th of February 2017 states that section 55 notices were served by Kildare County Council on the landowners of the site in August 2015 in order to prevent or limit environmental pollution caused, or likely to be caused by the holding, recovery or disposal of waste.

8.3.14 In this regard, I am not satisfied that the development would not have an adverse impact on the pNHA due to its proximity and potential for groundwater pollution. In this context, I consider that the restriction on exemptions under Article 9 (1) (a) (viiC) of the Planning and Development Regulations, 2001 (as amended) is applicable in this instance.

9.0 Recommendation

9.1. I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the erection of an unroofed fenced area for the exercising or training of horses or ponies together with a drainage bed or soft surface material to provide an all-weather surface at, Palmerstown House Estate, Johnstown, Co. Kildare is or is not development or is or is not exempted development:

AND WHEREAS Luke Comer requested a declaration on this question from Kildare County Council and the Council issued a declaration on the 4th day of September, 2017 stating that the matter was development and

was not exempted development:

AND WHEREAS Luke Comer referred this declaration for review to An Bord Pleanála on the 29th day of September, 2017:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2, 3 and 4 of the of the Planning and Development Act, 2000, as amended,
- (b) Article 6(1) and Article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Class 10 of Part 3 of the Planning and Development Regulations, 2001, as amended,
- (d) the nature of the works, the enforcement history of the site and the Determination by the EPA under Article 27 of the European Communities (Waste Directive) Regulations 2011 issued on the 1st of March 2011.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the construction of an unroofed fenced area constitutes works;
- (b) the works constitute development pursuant to section 3 of the Planning and Development Act, 2000;
- (c) the development comes within the scope of Class 10 of Part 3 of Schedule 2 to the Planning and Development Regulations 2001;
- (d) the restrictions on exemptions outlined in Article 9 (1) (a) (viiC) and Article 9 (1) (a) (viii) are applicable in this instance.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the said works,

consisting of the erection of an unroofed fenced area for the exercising or training of horses, together with a drainage bed or soft surface material to provide an all weather surface is development and is not exempted development.

Erika Casey
Senior Planning Inspector

24th January 2018